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No. 93-639

In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Respondent.

On Writ Of Certiorari To The Florida First District Court Of Appeal

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

Whether the State of Florida's statutory scheme violates the first amendment when it prohibits an employee of a firm that is not licensed as a public accounting firm from holding herself out to the public as a certified public accountant (CPA) when providing accounting and tax services to the public.

Whether the State of Florida's regulatory scheme violates the first amendment when it prohibits certified public accountants (CPAs) who are practicing public accounting from using the term "certified" in connection with self-designations and titles not approved by the Florida Board of Accountancy.

PARTIES TO THE PROCEEDING

The Florida Department of Business and Professional Regulation[1] was the Petitioner in the original administrative action, the Appellee in the Florida District Court of Appeal, First District, and is the Respondent before this Court.

The Florida Board of Accountancy is a regulatory board created within the Florida Department of Business and Professional Regulation. The Board's final order is at issue in this proceeding.

Sylvia S. Ibanez was the Respondent in the original administrative action, the Appellant in the Florida District Court of Appeal, First District, and is the Petitioner before this Court.

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[1] At the time this action was commenced and until July 1, 1993, the Department was the Department of Professional Regulation. Pursuant to Chapter 93-220, Laws of Florida, effective July 1, 1993, the Florida Departments of Professional Regulation and Business Regulation were abolished and their functions merged into the newly created Department of Business and Professional Regulation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 9

ARGUMENT 11

I. THE STATE OF FLORIDA'S REGULATION OF THE PRACTICE OF PUBLIC ACCOUNTING DOES NOT VIOLATE THE FIRST AMENDMENT 11

A. The State of Florida Regulates the Practice of Public Accounting Through the Use of a Title Act 11

B. The State of Florida Defines the Practice of Public Accounting as Providing Services Involving the Use of Accounting or Management Advisory or Consulting Services to the Public While Holding Out to the Public That the Provider is a Certified Public Accountant ("CPA") 13

C. The State of Florida Restricts the Use of the CPA Designation to Those Licensees Who Conform to the Requirements of Chapter 473, Florida Statutes, and the Rules Regulating the Profession 18

TABLE OF CONTENTS – Continued

Page

II. THE STATE OF FLORIDA'S REGULATION OF THE TERM "CERTIFIED" DOES NOT VIOLATE THE FIRST AMENDMENT 29

A. The State of Florida's Restriction of the Use of the Term CFP When the Term is Used by CPAs Does Not Violate the First Amendment 29

B. The State of Florida Requires the Disclosure of Reasonable Information in Connection With the Use of Titles by Licensed Professionals 29

CONCLUSION 36

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Abramson v. Gonzalez, 949 F.2d 1565 (11th Cir. 1992) 12

Accountant's Society of Virginia v. Bowman, 860 F.2d 602 (4th Cir. 1988) 11, 20, 24, 31

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 34

Board of Trustees of State University of New York v. Fox, 492 U.S. 469 (1989) 27

Central Hudson Gas & Electric Corp. v. Public Service Commissions of New York, 447 U.S. 557 (1980) .. *passim*

Edenfield v. Fane, 507 U.S. ___, 113 S.Ct. 1792 (1993) 27

Evans v. Hoyme, 105 N.W.2d 71 (S.D. 1960) 14

Friedman v. Rogers, 440 U.S. 1, *reh'g denied*, 441 U.S. 917 (1979) 20

Gandee v. Glaser, 785 F. Supp. 684 (S.D. Ohio 1992) 24

Heller v. Abess, 134 Fla. 610, 184 So. 122 (1938) 11

Silvia Ibanez v. Board of Accountancy, et al., No. 91-4047WS (N.D. Fla.) 5

In re R.M.J., 455 U.S. 191 (1982) 21, 35

Major v. Department of Professional Regulation, 531 So. 2d 411 (Fla. Dist. Ct. App. 1988) 3

Manasota 88, Inc. v. Tremor, 545 So. 2d 439 (Fla. Dist. Ct. App. 1989) 28

Mercer v. Hemmings, 170 So. 2d 33 (Fla. 1964) 11, 21

TABLE OF AUTHORITIES – Continued

Page

Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91 (1990) 18, 22, 30, 32, 33

Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) 27

Public Employees Relations Comm'n v. Dade County Police Benevolent Ass'n, 467 So. 2d 987 (Fla. 1985) 28

Rogers v. State, 487 So. 2d 57 (Fla. Dist. Ct. App. 1986) 14

Smith v. California, 336 F.2d 530 (9th Cir. 1964) 12

United States v. Edge Broadcasting, 509 U.S. ___, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993) 24, 25, 27

United States v. Arthur Young & Co., 465 U.S. 805 (1984), *cert. denied*, 466 U.S. 936 (1984) 11, 21

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 18

Ward v. Rock Against Racism, 492 U.S. 781 (1989) 27

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) 26

CONSTITUTIONS AND STATUTES:

Civil Rights Act of 1871: 42 U.S.C. § 1983 (1991) 5

U.S. CONST. amend I ..... *passim*

Chapter 93-220, Laws of Florida ii

Fla. Stat. Chapter 120 3

Fla. Stat. § 120.56 4

TABLE OF AUTHORITIES – Continued

Page

Fla. Stat. § 120.57(1) 3

Fla. Stat. § 120.57(1)(b)10 3

Fla. Stat. § 455.225 3

Fla. Stat. § 455.225(1) 24

Fla. Stat. Chapter 473 ..... *passim*

Fla. Stat. § 473.301 25

Fla. Stat. § 473.302 .....1, 28

Fla. Stat. § 473.302(4)(a) 14

Fla. Stat. § 473.302(4)(b) 14

Fla. Stat. § 473.309 .....13, 19

Fla. Stat. § 473.31 13

Fla. Stat. § 473.3101 .....13, 19

Fla. Stat. § 473.315 13

Fla. Stat. § 473.3205 13

Fla. Stat. § 473.323 13

Fla. Stat. § 473.323(1)(a) 4, 7, 19

Fla. Stat. § 473.323(1)(f) 4

Fla. Stat. § 473.323(1)(g) 4

Fla. Stat. § 473.323(1)(h) 4

Fla. Stat. § 473.323(3) 7

TABLE OF AUTHORITIES – Continued

Page

OTHER RELATED AUTHORITIES:

Fla. Admin. Code Chapter 21A 9, 11, 13, 16

Fla. Admin. Code § 21A-20.011 14

Fla. Admin. Code § Rule 21A-20.012 4

Fla. Admin. Code § Rule 21A-22 13

Fla. Admin. Code § Rule 21A-24.001 ...4, 10, 21, 29, 33

Fla. Admin. Code § Rule 21A-24.001(1)(i) 8, 29, 30, 33

Fla. Admin. Code § Rule 21A-24.001(1)(j) 29, 34

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Respondent accepts the Petitioner's Statement regarding the constitutional and statutory provisions at issue in this case, with the addition of subsections 473.302(4)(a) and (b), Florida Statutes (1991), which are set out in full in the Appendix to this brief.

STATEMENT OF THE CASE

The Respondent rejects the Statement of the Case as presented by Petitioner because her Statement goes well beyond an objective statement of these proceedings and injects legal argument. Accordingly, the Respondent presents the following Statement of the Case:

The practice of public accounting is defined as performing services for the public which involve the use of accounting skills or management advisory or consulting services by a certified public accountant or any person holding herself out as a certified public accountant.[2] Silvia Ibanez is a certified public accountant who received her license from the Florida Board of Accountancy in 1982. (J.A.3; R.423). While working for the CPA firms of Coopers & Lybrand and Main Hurdman, she performed all aspects of tax practice for both individuals and businesses, including the preparation and review of tax returns; representing clients in Internal Revenue Service ("IRS") audits; and rendering tax opinions and interpretations of the tax code, regulations, rulings and applicable caselaw. (R.470).

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[2] Section 473.302, Fla. Stat. (1991).

Ibanez is also a member of The Florida Bar in good standing and is a Certified Financial Planner certified by the International Board of Standards and Practice for Certified Financial Planners. (R.1223). In her current practice, Ibanez also provides all types of tax services to her clients, including tax opinion work, representation before the IRS, evaluation of the tax consequences of certain transactions, and financial counseling and planning. (R.470, 1225) Indeed, Ibanez testified in the proceedings below that many of the activities performed under the guise of her law firm are identical to those functions she performed while working for CPA firms. (R.464-471, 1225-1226). However, when asked if she was required to register her firm with the Board of Accountancy, she replied, "Not at all. It's a law firm." (R.207) Yet, her testimony indicated her awareness of other, non-accounting firms which had been registered by the Board for use of the CPA designation. (R.209, 210).

Ibanez is listed in the yellow pages of the telephone book under the heading, "Attorneys," as "Ibanez, Silvia, S., CPA, CFP." She is also listed in the white pages of the telephone book as "Ibanez, Silvia S., CPA CFP atty." Ibanez's business card also states, "Silvia Safille Ibanez, JD, CPA, CFP." (R.86, 1123).

On June 13, 1991, the Department of Professional Regulation filed an Administrative Complaint against Ms. Ibanez, alleging violations of Chapter 473, Florida

Statutes, based upon her use of the CPA and CFP designations in the telephone advertisements and on her business card.[3] In an Amended Administrative Complaint as modified by an August 22, 1991, order of the hearing officer, the factual allegations against Ms. Ibanez were in pertinent part:

> 3. Respondent is listed in the yellow pages of the Winter Haven [Florida] area phone book under the heading "attorneys."
>
> 4. This listing in the phone book states "Ibanez Silvia S. CPA CFP."
>
> 5. Respondent is also listed in the white pages of the Winter Haven area phone book.
>
> 6. This listing states "Ibanez Silvia S CPA CFP atty."
>
> 7. The Respondent's business card states "Silvia Safille Ibanez, JD, CPA, CFP."
>
> 8. The Respondent provides or offers to provide services to the public through her firm

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[3] The prosecution of complaints against licensed professionals regulated by the Department is governed by section 455.225, Fla. Stat. Hearings are governed by the provisions of the Florida Administrative Procedures Act, Chapter 120, Fla. Stat. In this case, Ibanez chose a formal hearing pursuant to section 120.57(1), Fla. Stat. (R-4). Section 120.57(1) requires that a hearing officer assigned by the Department of Management Services, Division of Administrative Hearings act as a fact-finder. The hearing officer submits a recommended order to the agency, in this case the Board of Accountancy, for final action. While agencies can only reject findings of fact under very narrow circumstances, they are free to reject conclusions of law. See Fla. Stat. § 120.57(1)(b)10; *Major v. Department of Professional Regulation*, 531 So. 2d 411 (Fla. Dist. Ct. App. 1988).

called Silvia S. Ibanez, P.A., which firm is not licensed by the Florida Board of Accountancy.

9. The Respondent holds herself out to the public as a CPA in this unlicensed firm by appending the CPA designation after her name.

10. Based on Respondent's listing in the phone book and on her business cards, an uninformed person may not be able to differentiate whether she is in the practice of public accounting.

* * *

14. The Respondent appends the certified financial planner (CFP) designation along with the CPA designation after her name in the phone book and on her business cards.

(R.32-34). Based on these allegations, Ibanez was charged with violating subsections 473.323(1)(a), (f), (g) and (h), Florida Statutes, and Rules 21A-20.012 and 21A-24.001, Florida Administrative Code. (R.33).[4]

On May 10, 1991, Ibanez filed a separate petition pursuant to section 120.56, Florida Statutes, challenging the validity of Rule 21A-20.012, Florida Administrative Code, one of the rules upon which the disciplinary proceeding was based. (R.1221). As noted by the hearing officer who heard both cases, testimony and exhibits from the rule challenge were adopted into the record in the disciplinary proceeding. (R.1227). Ibanez also filed an

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[4] While the hearing officer struck paragraph eleven and the charges in Count I relating to that paragraph, paragraphs eight and nine were left intact. The allegations in the Amended Administrative Complaint are consistent with the Department's More Definite Statement. (R.99-102).

action in federal district court pursuant to 42 U.S.C. § 1983. *Silvia Ibanez v. Board of Accountancy, et al.*, No. 91-40471WS (N.D. Fla.).

Throughout the disciplinary proceedings, Ibanez maintained that she is not practicing public accounting and most importantly, that the Board of Accountancy has no jurisdiction over her. (J.A.69-70; R.179-193). John Sullivan, a CPA/attorney that testified on Ibanez's behalf, echoed this sentiment. While acknowledging that the public has a right to believe that a person using the CPA designation is subject to state regulation, Sullivan opined that if an attorney/CPA negligently prepares tax returns in his law practice, only The Florida Bar would have disciplinary jurisdiction to deal with the negligent conduct. (R.542-545).

During the formal hearing, Ibanez also admitted that she held herself out to the public as a CPA. (R.190, 426, 649). Indeed, Ibanez stated during her testimony that her clients consider it "extremely valuable" that she is a CPA and that she considers it valuable to her practice to be able to continue advertising that she is a CPA. (R.422, 522).

After consideration of the testimony and exhibits presented at formal hearing, on January 15, 1992, the hearing officer submitted a Recommended Order to the Florida Board of Accountancy recommending that the Board find that Ibanez is not holding herself out as a certified public accountant and finding her not guilty of the violations charged. (J.A.147-174; R.1247-1248). In the Recommended Order, however, the hearing officer found that Ibanez used her CPA designation in advertisements

in the yellow and white pages and on her business cards as charged by the Department. (J.A.151; R.1224). The hearing officer found that Ibanez's "intent in appending the CPA and CFP credentials . . . to her own name is to indicate [presumably to the public] that she is, in her own right, individually licensed as a CPA and CFP." (J.A.154; R.1227). The hearing officer also stated:

> The use of the term "CPA" implies a specific competency to the public. The fact that Ibanez is a CPA is valuable to her legal clients. CPA status is a valuable property right to each CPA, and the ability of the practicing attorney to publicize the fact that s/he holds an active CPA license is a valuable asset to that individual.

(J.A.153; R.1226).

In addition, the hearing officer concluded that, since 1982, the Board has consistently issued informal opinions that the designation "certified financial planner" is an accountancy specialization which has not been approved by the Board. She also noted that the Board held that the "CFP" designation could not be displayed by CPA licensees on stationary or in yellow pages listings in conjunction with the CPA designation. (J.A.157; R.1230). The hearing officer however did not find that use of the CFP designation in conjunction with CPA was a violation of the law.

On April 23, 1992, the Board considered the Recommended Order of the hearing officer. The Board accepted all of the Findings of Fact recommended by the hearing officer, with the exception of paragraphs 13, 21, 23, and 27, and the second sentence of paragraph 7. The Board rejected those recommended findings as they called for

legal conclusions rather than findings of fact. The Board also struck the next to last sentence of paragraph 24 as being incorrect because the Board has a rule which partially addresses the issue therein addressed. (J.A.179; R.1360-1361).

The Board rejected the conclusions of law recommended by the hearing officer and found that Ibanez is holding herself out as a certified public accountant and is engaged in the practice of public accountancy. Accordingly, the Board found violations of subsections 473.323(1)(a), (f), (g), and (h), Florida Statutes and Rule 21A-24.001, Florida Administrative Code. Ibanez was issued a reprimand. See section 473.323(3), Florida Statutes. (J.A.194; R.1377). The Board's order discussed at length the definition of public accounting and stated:

> To the extent therefore, however, that a CPA is providing one or more types of accounting skills and management advistory [sic] services to the public, and at the same time holding himself or herself out as a CPA, such an individual is practicing public accounting. Any other construction of the definition of the practice of public accounting would permit individuals, engaged in offering accounting services to the public and holding the CPA license, to trade upon the fact of their licensure, and to advertise that fact, while not being subject to the statutes and rules governing CPAs in the State of Florida. It is difficult to conceive how, to the extent Chapter 473 is a Title Act, it could legitimately be said to protect the public health, safety and welfare, if individuals who trade on that Title in commerce while using their accounting skills for

> the public, are not subject to the jurisdiction of the Board of Accountancy.

(J.A.183; R.1364-1365) (footnote omitted).

The Final Order of the Board also considered the Board's interpretation of Chapter 473 and the rules promulgated thereto in light of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). The Board concluded that generally the use of the CPA designation is commercial speech and not illegal or inherently misleading but that under the facts of this case, use of the designation is inherently misleading; that the regulation of the practice of public accounting is a vital governmental interest; that the statutes and rules in question further the governmental interest by ensuring that only those who meet certain standards can call themselves CPAs; and that the provisions are a "reasonable fit," in that the regulation simply requires that those who hold themselves as CPAs and who provide public accounting services remain subject to the State's licensure and regulation. (J.A.186-188; R.1368-1370).

With respect to the use of the CFP designation, the Board found that the use by a CPA of any of the terms, such as CFP, set forth in Rule 21A-24.001(1)(i), when those terms have not been approved by the Board, is inherently misleading. The Board noted that no request for Board approval of the CFP designation has ever been made, either by Ibanez or by the organization which awarded her the certification. (J.A.194; R.1376).

Ibanez appealed the Final Order of the Board to the District Court of Appeal, First District, State of Florida. The district court affirmed the Final Order of the Board,

without opinion, on June 9, 1993. (J.A.196). Rehearing by that Court was denied July 28, 1993. (J.A.198).

SUMMARY OF THE ARGUMENT

Ibanez petitions this Court asserting that the Florida Board of Accountancy has imposed a "blanket ban" on the use of the terms CPA and CFP by an attorney/CPA in her law firm's business cards, letterhead, and telephone listings. This "ban," Ibanez claims, violates her right to commercial speech under the first amendment.

The restrictions on the use of both appellations do not amount to a total ban on their use and do not run afoul of first amendment protections.

The State of Florida regulates the practice of public accounting through Chapter 473, Florida Statutes, and Chapter 21A, Florida Administrative Code. With the exception of the attest function, Chapter 473 is a "Title Act," meaning some functions performed by certified public accountants can also be performed by people who are not licensed. Those unlicensed persons, however, cannot hold themselves out as CPAs.

The practice of public accounting is defined as offering to perform or performing one or more types of services using accounting skills or management advisory or consulting services while holding out to the public as a certified public accountant. The State of Florida restricts the advertisement of the use of the term CPA to those licensees who are in compliance with the provisions of Chapter 473. Ibanez is practicing public accounting as

defined in Chapter 473 but asserts that she is not bound by the regulatory provisions governing the license she advertises. Accordingly, the Board is correct in determining that her advertisement of the use of CPA is inherently misleading and not subject to protection under the first amendment.

The Board's restriction on the use of the CPA designation is also permissible under the standards enunciated by this Court in the *Central Hudson* test, in that the asserted governmental interest of regulating the practice of public accounting is substantial; the restriction of directly advances the governmental interest by requiring compliance with the provisions of Chapter 473 which are designed to protect the health, safety and welfare of the public; and the restriction represents a reasonable fit between the need to regulate the practice of public accounting and ensuring that the advertisement of the designation is not misleading.

Further, Fla. Admin. Code r. 21A-24.001 (1991) contains two methods short of a ban for the use of the term CFP. The first is to obtain approval from the Board for its use, which Ibanez chose not to do. The second is to provide a disclaimer concerning the use of the appellation which Ibanez's advertising does not contain. The final order of the Board of Accountancy should be affirmed.

ARGUMENT

I. THE STATE OF FLORIDA'S REGULATION OF THE PRACTICE OF PUBLIC ACCOUNTING DOES NOT VIOLATE THE FIRST AMENDMENT.

A. The State of Florida Regulates the Practice of Public Accounting Through the Use of a Title Act.

Florida has regulated the practice of public accountancy since 1938. In *Heller v. Abess*, 134 Fla. 610, 184 So. 122 (1938), the Supreme Court of Florida held that the profession of public accounting was sufficiently charged with public interest to justify legislation providing for the registration of accountants and prohibiting the practice of accountancy as a CPA in Florida without state certification. *See also United States v. Arthur Young & Co.*, 465 U.S. 805, 817-821 (1984), *cert. denied*, 466 U.S. 936 (1984); *Accountant's Society of Virginia v. Bowman*, 860 F.2d 602 (4th Cir. 1988); *Mercer v. Hemmings*, 170 So. 2d 33, 39 (Fla. 1964). Accordingly, the Florida Legislature enacted Chapter 473, Florida Statutes, and the Florida Board of Accountancy promulgated Chapter 21A, Florida Administrative Code. Together these chapters regulate the practice of public accountancy in the State of Florida.

With the exception of the attest function[5], Chapter 473 is a "Title Act," meaning that other activities of

[5] Attest function refers to the process by which a CPA scrutinizes financial statements prepared by an entity and expresses an opinion as to whether the entity's financial position and results of operation are fairly presented in accord with generally accepted accounting principles.

certified public accountants are activities which can be performed by non-CPAs. As a Title Act, Chapter 473's sole purpose is to insure minimum competence and to protect the public from dishonest practitioners. This is accomplished by assuring the public that when the services of a CPA are used, the CPA is and will be subject to the technical, educational, and other licensure requirements established by the Florida Legislature and the Board of Accountancy. These standards provide for the independence, objectivity, and integrity of CPAs in the provision of accounting services. The Board reasoned:

> As was noted in *Abramson v. Gonzalez*, 949 F.2d 1567 (11th Cir. 1992), as well as *Smith v. California*, 336 F.2d 530 (9th Cir. 1964), the function of a Title Act is not to preclude individuals who *are not* licensed from performing a certain set of tasks, but rather to let the public know that those individuals who *are* licensed have met, and continue to meet, the standards set out by the legislature and the appropriate regulatory boards through statutes and rules.

(J.A.181; R.1363) (emphasis in original).

While Petitioner views the CPA as an attainment, it is not. Far more than merely a recognition of having passed the CPA exam, the designation represents a license granted by the State of Florida and the continued regulation of the professional holding that license.[6] By

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[6] Indeed, Ibanez's business card states "J.D." in addition to or instead of "attorney." The difference goes to the crux of this case in that one appellation implies educational attainment and the other implies a licensure regulation. While listing the attainment of a degree is truly biographical, advertising one's CPA status represents continued state regulation.

accepting the license as a CPA from the State of Florida, Ibanez accepts the responsibility to adhere to the provisions of Chapter 473, Florida Statutes and Chapter 21A, Florida Administrative Code. These provisions include, for example, technical standards (Fla. Stat. § 473.315 (1991) and Fla. Admin. Code r. 21A-22); prohibitions on the use of commissions and contingency fees (Fla. Stat. § 473.3205 and § 473.31 (1991)); licensure of partnerships corporations and compliance with the rules promulgated thereunder (Fla. Stat. § 473.309 and § 473.3101 (1991)); and adherence to disciplinary provisions (Fla. Stat. § 473.323 (1991)). If she chooses to practice public accounting and to hold herself out as a CPA, Ibanez cannot select those provisions which she finds convenient to follow and ignore the rest. She must follow them all.

B. The State of Florida Defines the Practice of Public Accounting as Providing Services Involving the Use of Accounting or Management Advisory or Consulting Services to the Public While Holding Out to the Public That the Provider is a Certified Public Accountant ("CPA").

The practice of public accounting is defined in Florida as:

> (a) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, one or more types of management advisory or consulting services, by a certified public accountant, or firm of certified public accountants, of this state, including the performance of such services in the employ of another person; or

> (b) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory or consulting services, by any other person holding himself or itself out as a certified public accountant or a firm of certified public accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out.

Fla. Stat. § 473.302(4)(a) and (b) (1991). The Florida Board of Accountancy has further defined the practice of public accounting to exclude from the definition those CPAs who do not hold themselves out to the public as certified public accountants. Fla. Admin. Code r. 21A-20.011 (1991). "Holding out" has been defined as engaging in advertising or a course of conduct to inform the public. *Evans v. Hoyme*, 105 N.W.2d 71, 75 (S.D. 1960); *Rogers v. State*, 487 So. 2d 57 (Fla. Dist. Ct. App. 1986).

The definition therefore requires two separate elements: (a) the provision of accounting or management advisory services to the public, and (b) the holding out to the public as a CPA providing these services. In the case before this Court, Ibanez has admitted to both elements of engaging in the practice of public accounting. (R.180, 426, 461, 464-466, 470, 1223-1226).

Ibanez currently holds a CPA license from the State of Florida and prior to her admission to The Florida Bar, was employed as a CPA by the public accounting firms of Coopers & Lybrand and Main Hurdman. (R.1223-1226). While employed at Coopers & Lybrand, Ibanez worked in

its auditing and tax departments and occasionally performed management consulting. At Main Hurdman, she worked as a tax supervisor and financial planner. Ibanez testified that in performing public accounting services with these firms, she was involved in all phases of tax practice, including tax preparation, the review of tax returns, the representation of clients before the IRS, the preparation of tax opinions, and the interpretation of applicable caselaw in different tax areas, including estate planning. (R.470). Ibanez acknowledges that all of these activities were performed in her role as a CPA. (R.1223-1226).

Ibanez also testified that in her current practice, she provides all types of tax services, including preparation of tax opinions, representing clients before the IRS, evaluating the tax consequences of specific transactions, and providing her clients with financial planning and counseling. (R.470-71, 1225). These services require that she analyze financial statements and give opinions based thereon. (R.460). Not only are these the services she previously provided as a CPA in her public accounting firms, they are services which Ibanez admits utilize her accounting education and skills. (R.461, 464-466, 1225).

Ibanez admits that she is holding herself out to the public as a CPA when providing these public accounting services in her current professional practice. When so asked, Ibanez stated, "So, if you're asking me am I holding out as a CPA – for identification purposes, yes, I identify to the world I am a CPA." (R.180, 426, 649). She also testified that her clients considered it "extremely valuable" that she have an active CPA license and that it

was valuable for her to hold herself out to the public as a CPA:

> It is a series of things. For example, when I do representational work before IRS most of the clients that come to me and want an attorney for representation before the IRS they find that the fact that I hold a CPA license and worked for many years as a public accountant makes me – endows me with the ability to really understand the tax returns in question so that I can discuss and defend the legal principles and advocate my client's position. So they feel that is an enhancement, that educational baggage or those educational marks that I have earned and worked so hard for.

(R.442-423; see also R.456, 522).

Ibanez's advertisements in the telephone book and on her business cards communicate to the public that she is currently licensed as a CPA and is in compliance with the related technical and educational requirements. To every member of the public who sees these advertisements, she is holding herself out as being a competent CPA in good standing to provide public accounting services.

Her previous testimony and behavior, however, refute that representation. As stated in the Final Order of the Board of Accountancy,

> [Ibanez] is unwilling to acquiesce in the requirements of Chapter 473 and Chapter 21A, F.A.C., by complying with those requirements. She does not license her firm as a CPA firm; forego certain forms of remuneration denied to

> individuals who are practicing public accountancy; or limit the ownership of her firm to other CPAs. Respondent places the term "CPA" after her name on her business cards and letterhead, and in the yellow pages of the telephone directory all of which, by any standard, must be considered advertising. Respondent further offers services to the public which, by her own admission, involve the use of the same accounting skills she used when she was performing accounting services in a CPA firm by so doing. Respondent has, in effect, told the public that she is subject to the provisions of Chapter 473, and the jurisdiction of the Board of Accountancy when she believes and acts as if she is not.

(J.A.185; R.1367) (footnotes omitted). In her testimony below, Ibanez stated that she is not practicing public accounting and that the Board has no jurisdiction over her. (R.182). However, in her brief before this Court, she states:

> Petitioner is in fact, a licensee subject to the rules of the Board of Accountancy. . . . Like every licensed CPA in Florida, Ibanez is obviously regulated by the Board. . . . [who] reprimanded [her] for disclosing to the public, information, that she was authorized to disclose by the Board itself.

(Petitioner's brief at 28). Thus, her disagreement with the Board has mutated from one of not being subject to regulation by the Board to having her first amendment commercial speech right impaired.

C. The State of Florida Restricts the Use of the CPA Designation to Those Licensees Who Conform to the Requirements of Chapter 473, Florida Statutes, and the Rules Regulating the Profession.

Petitioner asserts before this Court that the State of Florida has imposed an absolute ban on her ability to advertise her CPA status and that this ban fails to meet constitutional standards. Petitioner mischaracterizes the nature of the State's action. There is no ban on the use of the CPA credential by a CPA. This Court has acknowledged in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), that a state may impose measures short of a total ban of commercial speech. As stated in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976):

> Obviously, much commercial speech is not probably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.

Florida reasonably restricts the use of the CPA designation to those licensees who are practicing public accounting, such as Ibanez, and who also comply with the other requirements of Chapter 473. As noted in the Board's Final Order, Ibanez does not. Indeed, it is only her refusal to comply with these requirements, such as licensing her

firm with the Board, that compels the restriction of her use of the CPA designation.[7]

Moreover, the restriction on the use of the term CPA to those who comply with the provisions of Chapter 473 is a reasonable restriction which satisfies the requirements of the test enunciated by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U. S. 557, 566 (1980) and its progeny:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must

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[7] While Ibanez argues that her failure to license her firm is irrelevant because the Department did not charge her with practicing through an unlicensed firm, her argument overlooks the allegations in the Amended Administrative Complaint which were left intact by the hearing officer. The Department asserted that Ibanez was providing services and holding herself out to the public through her firm which was not licensed by the Florida Board of Accountancy. (R.32-34). These assertions were not struck by the hearing officer and were considered by the Board. Indeed, the Board in a footnote in its Final Order stated:

> [7]It is to be noted that Respondent could have simply been charged with practicing public accountancy through an unlicensed corporation in violation of Sections 473.309, 473.3101 and 473.323(1)(a), F.S. Notwithstanding this fact, since the ultimate issue in this cause must be whether or not Respondent is indeed practicing public accountancy by offering accounting services and using accounting skills while trading on the fact of her licensure as a CPA without complying with the provisions of Section 473 and the rules promulgated thereto, and thus deceiving or misleading the public, it is appropriate to approach these alleged violations in the context of deceptive or misleading advertising.

(J.A.185; R.1367).

> determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Under the first part of the *Central Hudson* analysis, the use of the designation "CPA" by a certified public accountant who holds an active individual license is generally not illegal or inherently misleading, and the Final Order below so noted. (J.A.186; R.1368). However, the Board found that the use of the CPA designation under the facts of this case, where the licensee is unwilling to comply with the provisions of the Title Act under which the license was granted, is inherently misleading and may be prohibited. *See Accountant's Society of Virginia v. Bowman*, 860 F.2d at 605-606. Therefore, under *Central Hudson*, the expression may not be protected under the first amendment.

In her brief on the merits, Ibanez summarily dismisses any discussion of *Friedman v. Rogers*, 440 U.S. 1, *reh'g denied*, 441 U.S. 917 (1979), because that case deals with trade names, which the Court reasoned had no intrinsic meaning. Ibanez asserts that *Friedman* is distinguishable because her use of the CPA designation after her name has an inherent meaning. Ibanez's reading of *Friedman* is too narrow. The focus in *Friedman* was on the potential for deception. This Court stated, "Because these

ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public." 440 U.S. at 12-13. Likewise, Petitioner's decision to selectively comply with the provisions of Chapter 473 while holding out that she is governed by all of them is also inherently misleading.

The State's restriction on the use of the CPA designation meets the second question of the analysis in that the regulation of the practice of public accountancy is not only a valid governmental interest, but a vital one. *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-821 (1984); *Mercer v. Hemmings*, 170 So. 2d 33 (Fla. 1964). Indeed, unlike the situation in *In re R.M.J.*, 455 U.S. 191 (1982), where no substantial governmental interest was articulated, Ibanez conceded the merit of the governmental interest before the Florida District Court of Appeal, First District. In her Amended Initial Brief before that court she asserted, "The BOA also argues, *with which we concur*, that the second prong is satisfied insofar as the asserted governing [sic] interest, i.e. to regulate the practice of public accounting, is substantial." (Appellant's Amended Initial Brief at 32; emphasis added). Ibanez now seeks to change the focus of inquiry, asserting that the State has no substantial interest in "totally suppressing Petitioner's advertising of her CPA credential." (Petitioner's Brief at 29).

Once again, there is no total ban on her use of the CPA credential. Rule 21A-24.001, Florida Administrative Code does not create a blanket prohibition on a CPA advertising her licensure status. Such an advertisement is

permissible where it is not fraudulent, false, deceptive or misleading. The State's continued regulation ensures that CPAs provide accounting services in a competent, professional and ethical manner and that the public is aware that violations of professional standards will be addressed. Clearly, the State has a substantial interest in ensuring that only those persons who subject themselves to the regulation of the practice of public accounting may advertise their licensure status. In order to assert her CPA status, Ibanez need only comply with the provisions of Chapter 473.

Although Ibanez asserts the lack of a valid governmental interest under the second question posed in the *Central Hudson* test, her assertion is more appropriately considered as a challenge to the third inquiry, whether the regulation directly advances the governmental interest asserted. 477 U.S. at 566. As noted previously, Ibanez conceded the validity of the governmental interest at stake. The restriction of Ibanez's advertising her CPA status until she complies with the requirements of Chapter 473 clearly meets the third requirement under *Central Hudson*.

This Court in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 108 (1990), reiterated that "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information." However, the issue that was not presented in *Peel* is now before this Court: whether the State's substantial interest in the regulation of the practice of public accountancy is served by regulating the disclosure of licensure

status when the licensed individual refuses to be bound by the regulatory requirements associated with licensure.

Publication of one's licensure as a CPA not only signifies having met certain educational, examination and experience requirements, but also signifies continued regulation and licensure of the CPA by the State through the Board of Accountancy. Only through this continued regulation can the State ensure that CPAs provide accounting services in a competent, professional manner. By requiring CPAs to submit to continued regulation in order to advertise licensure status, Florida is acting in a direct and causal manner to further its interest in ensuring that those CPAs who hold themselves out to the public as practicing public accounting are in fact competent to do so. Holding oneself out as a CPA not only represents that the individual has a license to practice granted by the State, but also that the licensee is subject to sanctions by the appropriate regulatory board for any deficiencies in the practice of the profession.

By contrast, Ibanez's interpretation of law would exempt her from any disciplinary action for any negligence she might commit while performing public accounting services. For example, an attorney/CPA is retained by a client because of her dual licensure, for the purposes of representation before the IRS. Her representation is grossly negligent, demonstrating a lack of understanding of the tax code and the applicable regulations. Under Ibanez's interpretation of the regulatory scheme, only the Florida Bar would have any jurisdiction to take disciplinary action against the attorney/CPA, leaving her license as a CPA unblemished and allowing the licensee to set up a CPA firm providing the same grossly negligent

service for which The Florida Bar disciplined her. Despite her advertisement of her CPA status, the Florida Board of Accountancy would be powerless to respond to any complaint the client may file with the Department. Such an interpretation makes the claim of state licensure misleading and would undermine any regulation of public accounting the State might undertake. Indeed, it also runs afoul of the Department's statutory mandate to investigate and prosecute legally sufficient complaints against licensees. Fla. Stat. § 455.225(1)(1991). The Department's interpretation of the regulatory scheme would subject the attorney/CPA to discipline by both licensing authorities. Such a reading would effectuate the protections afforded the public by both regulatory bodies.

Ibanez dismisses applicability of cases such as *Accountant's Society of Virginia v. Bowman*, 860 F.2d 602 (4th Cir. 1988) (state's prohibition of the use of title "public accountant" by non-CPA permissible) and *Gandee v. Glaser*, 785 F. Supp. 684 (S.D. Ohio 1992), because they deal with the conduct of unlicensed persons. However, the function of a title act such as Chapter 473 is not to prevent individuals who are not licensed from performing certain functions, but to inform the public that those individuals who are licensed have met and continue to meet the standards set out by the Legislature and the appropriate regulatory boards. To the extent that Ibanez seeks to trade on the CPA designation to obtain professional employment without complying with the provisions that regulate the practice she advertises, her status is analogous to that of an unlicensed individual.

Petitioner also summarily dismisses this Court's recent decision in *United States v. Edge Broadcasting*, 509

U.S. ___, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993), by simply saying that the asserted governmental interest of the Board cannot be directly advanced by absolutely prohibiting Ibanez's truthful, verifiable speech. To the contrary, the interest of the Board in regulating the practice of public accounting is directly advanced by requiring licensees to comply with the provisions of Chapter 473 in order to advertise their CPA status. As noted in *Edge Broadcasting*, the issue of whether the regulation directly advances the governmental interest cannot be answered by limiting the inquiry to whether the interest is directly advanced as applied to a single person or entity. The regulation must be viewed in light of the overall goal to be accomplished. 113 S.Ct. at 2705. As stated previously, the goal of the regulation of the practice of accountancy is to maintain the competency of the profession and to protect the public from dishonest practitioners. See Fla. Stat. § 473.301 (1991). Requiring compliance with the provisions of Chapter 473 in order to advertise one's CPA status encourages compliance with the regulatory scheme as contemplated by the legislature. Thus, the policy decisions regarding what regulatory measures will protect the public are left in the hands of the legislature and the Board. The alternative is to allow individual licensees to selectively determine what measures will protect the public based upon their determination of how convenient compliance may be.

In this case, the Board's restriction on the use of the appellation satisfies the inquiry whether it is viewed in isolation or as applied to Ibanez. In addition to the testimony of Louis Dooner referenced by Ibanez, John Sullivan, an attorney/CPA, testified that the public has a

right to believe that a person using the CPA designation is subject to state regulation. (R.542). John Rowe, former president of the Florida Institute of Certified Public Accountants, also testified that

> in a case where a CPA is in public practice and offering his or her services to the public, the CPA – I mean, the public has an interest in knowing whether the person is a CPA or not, and whether they are, in fact, practicing public accounting, being subject to the laws, regulations, and the ethical provisions of the profession.

(R.580). Dean Dennison, Chairman of the Board agreed, stating that the use of the CPA designation carries with it an additional responsibility and that the public has a right to expect a licensee to be accountable under that license. (R.670, 674).

Yet Ibanez testified that she personally is not required to comply with the provisions of Chapter 473. (J.A.69-70; R.179-193). Furthermore, while Ibanez asserts that the record is devoid of any evidence that anyone was misled by her advertisements, this Court has held that where the possibility of deception is self-evident, the state need not survey the public for factual support. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652-653 (1985).

Requiring compliance with the provisions of Chapter 473 directly advances the Board's goal of regulating the practice of public accountancy but is also no more restrictive than necessary to achieve the State's interest. *Central Hudson*, 447 U.S. at 566. As this Court has noted, there

must be a "fit" between the restriction and the governmental interest "that is not necessarily perfect, but reasonable." *Edge Broadcasting*, 113 S.Ct. at 2705; *see also Edenfield v. Fane*, 507 U.S. , 113 S.Ct. 1792, 1798, 123 L.Ed. 2d 543 (1993); *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989); *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). This Court further stated that

> the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case.

Edge Broadcasting, 113 S.Ct. at 2705, *quoting Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989). As articulated in the Final Order of the Board,

> The statutes and regulations in question, which simply require that individuals, who trade on the fact of their licensure as CPAs while offering accounting skills and services to the public, must comport with the rules and regulations governing the practice of public accounting, is a "reasonable fit" between the public good, i.e., the knowledge that any individual trading on the fact they are [a] CPA, will be regulated by the public and agency in question, and the limitation on individual licensee's rights to call oneself a CPA while not complying with the requirements of the statute.

(J.A.187; R.1369-1370).

Petitioner asserted below that the goals of the Board could be met by the use of a verbal disclaimer to her clients that she was not practicing public accounting

despite her use of the designation. Such an assertion ignores the finding of the Board, which was affirmed by the district court of appeal, that Ibanez is in fact practicing public accounting, as defined by section 473.302, Florida Statutes and interpreted by the Florida Board of Accountancy.[8] Therefore, such an assertion would not be truthful. Further, even assuming that Ibanez was willing to inform her clients that she was not in compliance with the provisions of Chapter 473 and considered herself to be exempt from disciplinary action by the Board for any negligent acts she might commit, such conduct would undermine the entire regulatory process for a title act such as Chapter 473.

Requiring Ibanez to comply with the provisions of Chapter 473 is the prerequisite for her to claim the benefit from which she seeks to profit. Her ability to comply is evident from the record, wherein Ibanez herself acknowledged that many "law" firms are registered with the Board of Accountancy. (R.207, 224, 553, 685). Requiring this compliance demonstrates a reasonable fit between the asserted governmental interest of regulating the practice of public accounting and her right to advertise as a licensee governed by those regulations. Because Rule

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[8] Under Florida caselaw, an agency charged with enforcement of a statutory provision has the principal responsibility for interpreting that provision consistent with the intent of the legislature. A reviewing court must defer to an agency's interpretation of the law where that interpretation is consistent with legislative intent and is supported by competent, substantial evidence. *Public Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987 (Fla. 1985); *see also Manasota 88, Inc. v. Tremor*, 545 So.2d 439 (Fla. Dist. Ct. App. 1989).

21A-24.001 and the statutes it implements are a reasonable restriction on the use of the CPA designation, the decision of the First District Court of Appeal should be affirmed.

II. THE STATE OF FLORIDA'S REGULATION OF THE TERM "CERTIFIED" DOES NOT VIOLATE THE FIRST AMENDMENT.

A. The State of Florida's Restriction of the Use of the Term CFP When the Term is Used by CPAs Does Not Violate the First Amendment.

Petitioner's advertisements also use the term "CFP," (Certified Financial Planner) in connection with her use of the appellation "CPA." Rule 21A-24.001(1)(i)-(j), Florida Administrative Code, provides:

> (1) No licensee shall disseminate or cause the dissemination of any advertisement which is in any way fraudulent, false, deceptive, or misleading, if it, among other things:
>
> . . . .
>
> (i) States a form of recognition by any entity other than the Board that uses the terms "certified," "public," "auditor," or "auditing" however, this would not prohibit a licensee from disclosing that he is a CPA in another state or jurisdiction; or
>
> (j) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accounting, unless the statement contains a disclaimer stating that the recognizing agency is not affiliated

> with or sanctioned by the state or federal government. The advertisement must also contain the agency's requirements for recognition, including, but not limited to, educational, experience and testing. These statements must be in the immediate proximity of the statement that implies formal recognition as a specialist.

The Board concluded that the use, by a CPA, of any of the terms set forth in Rule 21A-24.001(1)(i), when those terms have not been approved by the Board, is inherently misleading. The Board stated,

> "[C]ertified", when used in conjunction with public accountancy, means state licensure or approval. See *Peel v. Attorney Registration and Disciplinary Commission*, ___ U.S. ___, 110 S.Ct. 2294-95, (1990), (Marshall, J. concurring). It is the Board's position that the use, by a CPA, of any of the terms set forth in Rule 21A-24.001(1)(i), when those terms have not been approved by the Board is inherently misleading.
>
> In balancing the public's right to know of attainments of CPAs in addition to their license as a CPA, it is the Board's position that the use of terms set forth in Rule 21A-24.001(1)(i), in conjunction with the term "CPA" and the practice of public accounting, are so close to the terms protected by state licensure itself, that their use, when not approved by the Board, inherently mislead the public into believing that state approval and recognition exists. The terms prohibited by Rule 21A-24.001(1)(i), thus can only be used in conjunction with the "CPA" when the Board, in fact, approved a form of recognition or self designation using such terms as a Board approved specialty. It is to be noted that the Board has the authority to approve the use of such specialty designation by CPAs, however no request has ever been made for approval either by Respondent or by the parent organization which awarded her the certificate as a Certified Financial Planner, cf. *Accountant's Society of Virginia v. Bowman, supra.*

(J.A.193-194; R.1375-1376). Accordingly, the Board found Ibanez's advertisements to be in violation of Rule 21A-24.001 with respect to the use of the CFP designation in conjunction with the CPA.

Ibanez asserts that the "prohibition" against her advertisement of the CFP designation is unconstitutional because her advertisement of the designation is not potentially misleading and, in the alternative, that any misleading aspect of her advertisement could be cured through the use of a disclaimer. Neither argument has merit.

Petitioner also indicates that no valid governmental interest has been expressed to support the prohibition of her use of the term CFP in conjunction with CPA. As noted before, however, Ibanez conceded the existence of a valid governmental interest before the district court. The proper regulation of the practice of public accountancy remains a valid governmental interest.[9]

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[9] Ibanez also asserts that the Board has not banned the use of the term in a uniform manner. However, the Board opinion to which Ibanez refers involves a CPA who is not practicing public accounting and is not holding out to the public. (R.222, 372). Ibanez, by contrast, is practicing public accountancy and is holding herself out to the public as doing so.

Ibanez's claim that the use of the term CFP is not misleading when used in conjunction with CPA because the CFP certificate is "more akin to educational attainment" cannot be sustained. (Petitioner's brief at 37). Testimony below of Robert Goss, Executive Director for the International Board of Standards and Practices for Certified Financial Planners, Inc., (IBCFP) indicates otherwise. Mr. Goss testified that the IBCFP is an "international certification, standard setting, *licensing* and disciplinary body" for those who have a CFP and that the CFP mark is limited to use by those who are licensed by them to use it on an annual basis. (R.163, 175).[10] He also indicated that IBCFP has no affiliations with any governmental licensing organization within the State of Florida. (R.177). Thus, the CFP designation cannot be characterized as an educational attainment.

Moreover, unlike the situation presented to this Court in *Peel*, both the licensure at issue, Certified Public Accountant, and the private designation, Certified Financial Planner, begin with the word "certified." As noted by Justice Marshall in his concurring opinion, the term "certified" will often be understood by the general public as connoting governmental authorization. 496 U.S. at 113.

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[10] Interestingly enough, while Mr. Goss testified and the IBCFP has filed an amicus brief on Ibanez's behalf, the telephone directory advertisements at issue in this case do not comport with the IBCFP's Standard of Ethics. Those standards provide, "A CFP designee may be listed in Yellow Pages type advertising under the heading Financial Planner." (R.166, 177, 245). Ibanez's advertisement was not listed under the heading Financial Planner, but under the heading "Attorneys." (R.86, 1123).

Indeed, Justice Marshall specifically noted that many states prescribe requirements for and "certify" public accountants. That is the situation which presents itself in this case. Given that certification of a public accountant is equal to licensure in the State of Florida, it is inherently misleading to advertise another designation using the same term. Thus, the use of the CFP designation in conjunction with the CPA is not entitled to protection under the first amendment. *Peel, supra; Central Hudson.*

Even assuming Ibanez's use of the CFP designation is not inherently misleading, it is by all accounts potentially misleading. The Board can enact measures short of a total ban to prevent deception or confusion. *Peel*, 496 U.S. at 116 (Marshall, J., concurring). Contrary to Ibanez's assertions, the Board provided such an alternative which she chose not to pursue.

B. The State of Florida Requires the Disclosure of Reasonable Information in Connection With the Use of Titles by Licensed Professionals.

Ibanez asserts that banning the use of the CFP mark in conjunction with the CPA designation does not advance the State's interest and accordingly, such a ban must fail. She does not recognize, however, that Rule 21A-24.001, Florida Administrative Code provides two avenues of compliance short of prohibiting the use of the term in advertisements. The Board specifically noted that it has the authority to approve the use of a term listed in Rule 21A-24.001(1)(i); however, no request has ever been made by Ibanez or by the IBCFP. (J.A.193-194; R.1375-1376). Moreover, the Board specifically interpreted

the use of the designation as a specialty designation and, as noted by the hearing officer, the Board has so interpreted the designation since 1982. (J.A.157; R.1230).[11] As such, Rule 21A-24.001(1)(j) provides for a disclaimer that could have been utilized in Ibanez's advertising:

> (1) No licensee shall disseminate or cause the dissemination of any advertisement or advertising which is in any way fraudulent, false, deceptive, or misleading, if it, among other things:
>
> . . . .
>
> (j) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice accounting, *unless the statement contains a disclaimer with or sanctioned by the state or federal government. The advertisement must also contain the agency's requirements for recognition,* including, but not limited to, educational experience and testing. These statements must be in the immediate proximity of the statement that implies formal recognition as a specialist.

(Emphasis added). Ibanez's advertisements contain no such disclaimer.

As stated by Petitioner, this Court has consistently found in favor of more disclosure by professionals who advertise. *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977)("the preferred remedy is more disclosure rather

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[11] Ibanez asserts, as does the IBCFP, that financial planning is not a specialty of certified public accounting and is in fact, a separate discipline. The Florida definition of public accounting, however, includes services which use accounting skills or offer management advisory or consulting services. Financial planning fits within this definition.

than less"). *See also In re R.M.J.*, 455 U.S. 191 (1982). The opportunity to use a disclaimer as provided by the Board's advertising rule is a reasonable means to advance the interests of the Board in preventing the misimpression that CFPs are licensed by the State, while affording the licensee a method by which the designation could be advertised.

In sum, the use of the CFP mark, without more, in conjunction with the CPA designation is inherently misleading and thus not entitled to first amendment protection. Even assuming that this Court finds this argument unpersuasive, the provision for Board approval of the CFP mark or for use of a disclaimer in conjunction with the CFP mark cures any constitutional infirmity Petitioner may assert. Accordingly, the decision of the State of Florida, First District Court of Appeal, should be affirmed.

CONCLUSION

The Respondent respectfully requests that the decision of the State of Florida, First District Court of Appeal be affirmed.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS

473.302 Definitions. – As used in this act, the term:

(5) "Practice of," "practicing public accountancy," or "public accounting" means:

(a) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, one or more types of management advisory or consulting services, by a certified public accountant, or firm of certified public accountants, of this state, including the performance of such services in the employ of another person; or

(b) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory or consulting services, by any other person holding himself or itself out as a certified public accountant or a firm of certified public accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out.